Supreme Court, U.S.
FILED

98 170 JUL 22 1998

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

KEYSTONE COCA-COLA BOTTLING CO.,
Petitioner,

v.

PENNSYLVANIA UNEMPLOYMENT
COMPENSATION BOARD OF REVIEW,
Respondent.

On Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania

---

PETITION FOR WRIT OF CERTIORARI

BRADFORD L. LIVINGSTON
Counsel of Record
JEFFREY C. KAUFFMAN
JOSHUA L. DITELBERG
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Attorneys for Petitioner
55 E. Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

QUESTION PRESENTED

Whether, in awarding unemployment benefits to striking employees based upon its independent determination that the employer bargained in bad faith and that a labor agreement is invalid, a state usurps the National Labor Relations Board's primary jurisdiction over arguable unfair labor practices, resulting in conflicting standards for good-faith collective bargaining, and frustrating Congress' intent to establish a uniform, national labor law.

STATEMENT OF INTERESTED PARTIES

Petitioner, the petitioner below, is Keystone Coca-Cola Bottling Co.

Respondent, the respondent below, is the Pennsylvania Unemployment Compensation Board of Review.

The representative claimant below was William D. Williams. The other claimaints below were: Chetwin J. Harwood; Joseph R. Oliver; David F. Maximowicz; Raymond J. Mallarkey; Ronald Baker; James J. Mallarkey; Benjamin F. Ropetski; John F. Zaverack; William Borowski; Paul J. Patrick; Salvatore Acquisto; Steven Griffiths; Victor Bosco; Daniel F. Holby; Dale A. Gardinor; Robert J. Waslin; Rocco S. Yanora; Leigh R. Thompson; Allen L. Blackwell; Aaron P. Szura; Ronald J. Karalunas; Anthony J. Walaitis; John Hadley III; Donald Jacobs; Edward W. Galonis; Andrew P. Skolnick; Thomas Bindus; John Capral; John A. Murphy; Lawrence A. Wujcik; Robert Shimkoski; David J. Carey Jr.; Bruce Troy; Stanley Skrzysowski; Frank M. Rygiel; Peter Ciliberto; John F. Morris; Martin J. Guido; William Puchalsky; Frank G. Tokash; Robert E. Galonis; Eugene J. Godlewski; James Doran; Harry A. Sweppenheiser; Edward J. Bykowski; Raymond S. Matenus; Norman L. Klimasiewfski; James C. Galonis; James Langhorne; John R. Hutz; Michael Maskal; Joseph J. Puchalski; William T. Mullen; John J. Felondis; Raymond

Kempa; Richard A. Raymer, Jr.; James T. Vancosky; Michael Antonacci; Donald Hendrick; Joseph McGraw; John Mastalski; Michael J. Kane; Raymond Williams; Stephan Sedon; Jeffrey Tomko; David Pelak; Ken Deibert; William R. Reese, Jr.; Mark A. Oltra; Robert G. Erickson; William J. Fox; and Kenneth A. Hockenbury.

Pursuant to Rule 29.6 of the Rules of this Court, Keystone Coca-Cola Bottling Co. advises the Court that it is a business name or d/b/a of Herbco Enterprises, Inc., a privately-owned corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF INTERESTED PARTIES ii

TABLE OF CONTENTS iv

TABLE OF CITATIONS vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Introduction 3

B. Facts 3

C. Proceedings Below 5

REASONS FOR GRANTING THE WRIT 9

I. A STATE'S GRANT OF UNEMPLOYMENT BENEFITS BASED UPON ITS INDEPENDENT, LOCALIZED DETERMINATION THAT THE EMPLOYER BARGAINED IN BAD FAITH FRUSTRATES CONGRESS' INTENT TO ESTABLISH A UNIFORM, NATIONAL LABOR LAW UNDER THE PRIMARY JURISDICTION OF THE NLRB 12

A. The NLRA Established A Uniform, National Labor Law Administered By The NLRB. . . .12

B. Pennsylvania Undermines The Primary Jurisdiction Of The NLRB Over Arguable Unfair Labor Practices By Creating Conflicting Standards For Bad-Faith Bargaining . . . 14

C. Other States Also Award Unemployment Benefits On The Basis Of Their Determination That The Employer Has Bargained In Bad Faith 16

D. This Court's Unsettled Pronouncements In The Unemployment Compensation Area Have Left The States Free To Encroach Upon The Primary Jurisdiction Of The NLRB 20

CONCLUSION 23

TABLE OF CITATIONS

Page

Cases Cited:

Central Drywall Co., Inc. v. Industrial Commission,
724 P.2d 685 (Col. Ct. App. 1986) 19

Garner v. Teamsters Local 776,
346 U.S. 485 (1953) 15

Golden State Transit Corp. v. City of Los Angeles,
475 U.S. 608 (1986) 13

Keystone Coca-Cola Bottling Corporation v. Unemployment Compensation Board of Review,
693 A.2d 637 (Pa. Cmwlth. 1997) 1, 7, 8

Metropolitan Life Insurance Co. v. Massachusetts,
471 U.S. 724 (1985) 13

NLRB v. Rockaway News, 345 U.S. 71 (1953) 8

Nash v. Florida Industrial Commission,
389 U.S. 235 (1967) 12

New York Telephone Co. v. New York State Department of Labor,
440 U.S. 519 (1979) 11, 20, 21

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 13, 14

Vaca v. Sipes,
396 U.S. 171 (1967) 15

Wisconsin Dept of Indus., Labor and Human Relations v. Gould, Inc., 475 U.S. 282 (1986) 12

Statutes Cited:

Alaska Stat. § 23.20.383(b)(2) 17

Ark. Code Ann. § 11-10-58(a) 16

Ariz. Rev. Stat. § 23-777(B) 17

Del. Code Ann. tit. 19, § 3315(4)(c) 17

Fla. Stat. ch. 443.101(4)(b) 16

Ga. Code Ann. § 34-8-194(4)(C) 16

820 Ill. Comp. Stat. § 604 18

Ky. Rev. Stat. Ann. § 341.360(1) 16

Mass. Gen. Laws ch. 151A, § 25 16

Md. Code Ann., Lab. & Empl. § 8-1004(a)(1) . 16

Minn. Stat. § 268.09 16

Miss. Code Ann. § 71-5-513(A)(4)(a) 18

Mo. Rev. Stat. § 288.040 6.(2) 19

Mont. Code Ann. § 39-51-2305(a)(3) 18

N.H. Rev. Stat. Ann. § 282-A:36 (II-a) 16

Ohio Rev. Code Ann. §4141.29(D)(1)(a) 16

Okla. Stat. tit. 40, § 2-410(2)(c) 16

Or. Rev. Stat. § 657.200(3) 16

Pennsylvania Unemployment Compensation Law, 43 P.S. § 802(d) 5

S.D. Codified Laws § 61-6-19(3) 17

Utah Code Ann., § 35A-4-405(4)(a) 18

W. Va. Code § 21A-6-3(4) 18

Wis. Stat. § 108.04 17

Other Authority Cited:

28 U.S.C. § 1257(a) 1

29 U.S.C. § 151, et seq. 2

29 U.S.C. § 158 3,14

APPENDIX

APPENDIX A - APRIL 24, 1998 ORDER OF THE SUPPREME COURT OF PENNSYLVANIA DENYING PETITION FOR ALLOWANCE OF APPEAL 1a

APPENDIX B - ORDER OF COMMONWEALTH COURT OF PENNSYLVANIA DENYING APPLICATION FOR REARGUMENT ISSUED JUNE 4, 1997 . . . . . 2a

APPENDIX C - OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DECIDED APRIL 11, 1997 . . . . . 3a

APPENDIX D - DECISION AND ORDER OF THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW DATED MAY 31, 1995 . . . . 17a

Keystone Coca-Cola Bottling Co. ("Keystone" or the "Company") respectfully petitions this Court for a writ of certiorari to review a judgment of the Commonwealth Court of Pennsylvania in this case.

OPINIONS BELOW

The Commonwealth Court of Pennsylvania's opinion in *Keystone Coca-Cola Bottling Corporation v. Unemployment Compensation Board of Review*, App. 3a - 16a, is reported at 693 A.2d 637 (Pa. Cmwlth. 1997). The order of the Supreme Court of Pennsylvania denying Keystone's petition for allowance of appeal, App.1a, is unreported. The order of the Commonwealth Court of Pennsylvania denying Keystone's application for reargument, App. 2a, is unreported. The decision of the Pennsylvania Unemployment Compensation Board of Review, App. 17a - App. 36a, is unreported.

STATEMENT OF JURISDICTION

The Commonwealth Court of Pennsylvania issued its decision on April 11, 1997, and denied reargument on June 4, 1997. The Supreme Court of Pennsylvania entered its order denying Keystone's petition for allowance of appeal on April 24, 1998. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Sections 8(a)(1), 8(a)(5), and 8(d) of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*) ("NLRA" or "Act") provide in relevant part:

It shall be an unfair labor practice for an employer -

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
>
> * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation

> does not compel either party to agree to a proposal or require the making of a concession[.]

29 U.S.C. §§ 158(a)(1), (a)(5), (d).

STATEMENT OF THE CASE

A. Introduction

The decision below sanctions Pennsylvania's awarding unemployment benefits based on its independent determination that the employer engaged in bad-faith collective bargaining. By permitting Pennsylvania to create standards for good-faith bargaining in conflict with those developed by the National Labor Relations Board ("NLRB"), the Commonwealth Court of Pennsylvania frustrates Congress' intent to establish a uniform, national labor law.

B. Facts

This case involves an award of unemployment benefits to Keystone's employees who engaged in a strike seven months after the Company's final offer for a new labor contract was ratified by those employees and implemented. Pennsylvania awarded unemployment benefits based upon the state's independent determination that the Company engaged in bad-faith bargaining which invalidated the ratified agreement.

The factual background follows. On August 26, 1991, Keystone and International Brotherhood of Teamsters, Local 401 (the "Teamsters" or the "Union"), agreed to extend their existing collective bargaining agreement beyond its September 10, 1991 expiration date subject to the right of either party to terminate the extension agreement upon proper notice. More than two years later, negotiations for a successor agreement commenced and the parties thereafter continued negotiating to reach a contract.

On March 18, 1994, the Company properly notified the Teamsters that it intended to discontinue the 1991 extension agreement. App. 4a - 5a. Keystone's final offer to the Teamsters included a proposal seeking to reduce the Company's monthly pension contribution until December 31, 1998. App. 5a. In presenting Keystone's final offer to the local membership for a vote on March 26, 1994, Union leaders allegedly represented that the Company's negotiator had told the Teamsters' negotiator that the reduced pension contribution had been approved by the Central Pennsylvania Teamsters Pension Fund. The Company's employees voted to accept and ratify Keystone's final offer as the new agreement. The employees accepted over $130,000 in ratification bonuses. App. 5a.

Long after the new labor contract's terms had been implemented and the bonuses were paid, the Teamsters claimed the agreement was invalid because Keystone supposedly engaged in bad-faith bargaining prior to the

ratification vote. Despite this assertion, the employees continued working under the provisions of the successor contract for several more months. The Union, however, ultimately called a strike on November 21, 1994. The striking employees applied for unemployment benefits following their work stoppage. App. 5a - 6a.

C. Proceedings Below

Section 402(d) of the Pennsylvania Unemployment Compensation Law, 43 P.S. § 802(d) (1991) provides in pertinent part that:

> An employee shall be ineligible for compensation for any week ... (d) In which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he is or was last employed[.]

On January 30, 1995, the Pennsylvania Department of Labor and Industry determined that the representative claimant, William D. Williams ("representative claimant") was not entitled to unemployment benefits because the Teamsters' work stoppage was a strike, not a "lockout," under § 402(d). The representative claimant appealed to the Pennsylvania Unemployment Board of Review ("Unemployment Board"). On March 31, 1995, the

Unemployment Board's referee upheld the Pennsylvania Department of Labor and Industry's finding.

The representative claimant then appealed to the full Unemployment Board, which reversed the referee's decision on May 31, 1995. App. 17a - App. 36a. The Unemployment Board awarded benefits based upon its determination that Keystone engaged in bad-faith bargaining. It found that the Company's negotiator made alleged misrepresentations concerning the Central Pennsylvania Teamsters Pension Fund's willingness to accept the Company's pension proposal. It also found that the labor agreement between Keystone and the Teamsters was not "legally ratified," was never reduced to a formal written contract, and was never signed by the parties. App. 7a, 30a - 35a.

Consequently, the Unemployment Board concluded that the agreement -- which contained a provision that would have rendered the Teamsters' work stoppage a contract violation -- was invalid and that the strike constituted a "lockout" under § 402(d). App. 7a, 30a - 35a. The Unemployment Board's findings and conclusions were premised entirely upon its own independent standards for bad-faith collective bargaining. The NLRB made no determination whatsoever regarding whether or not Keystone had committed an unfair labor practice.

Keystone appealed the Unemployment Board's ruling to the Commonwealth Court of Pennsylvania, which affirmed the decision on April 11, 1997. On appeal, the Company argued that the Unemployment Board's determination that the Company bargained in bad faith was preempted by the primary jurisdiction of the NLRB over arguable unfair labor practices. App. 10a - 14a. The Commonwealth Court of Pennsylvania rejected Keystone's argument, opining without citation that the Company's "pre-emption arguments are unsupported by case law and are therefore rejected by the Court." App. 12a. (footnote omitted).[1]

Keystone also argued, consistent with federal labor law preemption principles, that the Unemployment Board lacked the power to determine the validity of the labor contract between the Company and the Teamsters and, indeed, to declare it invalid. App. 13a - 14a.

The Commonwealth Court of Pennsylvania rejected this argument as well, again emphasizing that the Unemployment Board was "acting within its prerogative" in determining that Keystone negotiated in bad faith, and in declaring invalid the

---

[1] The federal question arose as a result of the Unemployment Board's reliance upon its independent finding that the Company bargained in bad faith. Keystone raised the issue of the NLRB's primary jurisdiction at the first opportunity, *i.e.*, in its argument to the Commonwealth Court of Pennsylvania, and it duly was heard and decided on the merits. App. 10a - 14a.

collective bargaining agreement between the Company and the Teamsters:

> It is true that the Supreme Court in [*NLRB v.*] *Rockaway News*[, 345 U.S. 71 (1953)] stated that a contract should not be removed from the hands of the parties where they simply 'misunderstand' the legal limits of their bargain and that the excess provisions may be severed and invalidated, but not the entire contract. Nevertheless, that situation does not exist here, *where the [Unemployment] Board found that [Keystone's] misrepresentations and bad faith bargaining tainted the ratification vote*. It did not find that a misunderstanding between the parties tainted the vote. *On this critical issue*, the Supreme Court further stated in *Rockaway News* that there may be cases where a forbidden provision is so basic to and intertwined with the entire contract that it must stand or fall as a whole. *The [Unemployment] Board decided this precise point in favor of the Union.*

App. 14a. (emphasis added). Accordingly, the Commonwealth Court of Pennsylvania sanctioned the Unemployment Board's award of benefits based upon its independent determination that Keystone engaged in bad-faith bargaining with the Teamsters.

The Commonwealth Court of Pennsylvania denied Keystone's motion for reargument on June 4, 1997. The

Supreme Court of Pennsylvania denied the Company's petition for allowance of appeal on April 24, 1998.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning federal preemption of state unemployment compensation laws, as the decision below frustrates Congress' intent to establish a uniform, national labor law administered by the NLRB. According to this Court, Congress intended to foster stability in the area of labor relations by creating a centralized expert agency -- the NLRB -- to regulate collective bargaining and to determine whether unfair labor practices have been committed.

Thus, as this Court has emphasized, the NLRB has primary jurisdiction over conduct which is arguably protected or prohibited by the NLRA. As Congress determined, this is necessary to strike a balance of power among labor and management. This balance would be upset if a state could enforce its conflicting views concerning accommodation of the same interests.

By permitting Pennsylvania to award unemployment benefits based on its independent determination that the employer bargained in bad faith, the Commonwealth Court of Pennsylvania creates standards for good-faith labor negotiations in conflict with those developed by the NLRB.

The decision below creates precisely the disunity in the regulation of collective bargaining that Congress sought to avoid in enacting the NLRA. Employers negotiating with unions in Pennsylvania, including employers engaged in multistate or nationwide negotiations, either must conform to Pennsylvania's predilections regarding good-faith bargaining, or will incur financial liability for unemployment benefits if a work stoppage arises. Pennsylvania's idiosyncratic bargaining standards will create uncertainty among employers regarding the appropriateness of particular negotiating tactics.

The question presented by the petition has broad significance. As part of their unemployment compensation statutes, many states have provisions akin to Pennsylvania's under which benefits are premised upon a finding regarding the cause of a labor dispute, *i.e.*, whether a work stoppage is a "strike" or a "lockout." To the extent a state purports to independently determine the legality of a labor dispute under such a statute, it contravenes the NLRB's primary jurisdiction over arguable unfair labor practices.

Indeed, at least seven additional states -- Alaska, Arizona, Delaware, Mississippi, Montana, Utah, and West Virginia -- have provisions which expressly condition unemployment benefit eligibility upon whether the employer negotiated in bad faith or committed other arguable unfair labor practices. Colorado's judiciary endorses granting unemployment benefits on similar grounds.

This Court's unsettled pronouncements in the area of unemployment compensation have left the states free to develop their own standards for good-faith bargaining independent of the NLRB's, and to apply those local standards in considering benefit eligibility.

In *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979), this Court, in a plurality opinion by Justice Stevens with two Justices concurring and three Justices concurring in the result, held that in enacting the NLRA and the Social Security Act, Congress did not intend to prevent a state from granting unemployment compensation to strikers.

The question presented in *New York Telephone*, however, did not purport to address whether the NLRB's primary jurisdiction preempts a state from awarding unemployment benefits based upon its determination -- unrelated to any NLRB finding -- that the employer bargained in bad faith. The states and collective bargaining participants thus are left uncertain as to the relationship of the NLRB's primary jurisdiction to state unemployment compensation schemes.

For all these reasons, the petition should be granted because the question of whether a state may grant unemployment benefits based upon its own, localized attitudes towards good-faith bargaining is a substantial one. Pennsylvania and other states have been left free to usurp the

NLRB's primary jurisdiction, undermining Congress' intent in formulating a uniform, national labor policy.

I. A STATE'S GRANT OF UNEMPLOYMENT BENEFITS BASED UPON ITS INDEPENDENT, LOCALIZED DETERMINATION THAT THE EMPLOYER BARGAINED IN BAD FAITH FRUSTRATES CONGRESS' INTENT TO ESTABLISH A UNIFORM, NATIONAL LABOR LAW UNDER THE PRIMARY JURISDICTION OF THE NLRB.

A. The NLRA Established A Uniform, National Labor Law Administered By The NLRB.

This Court steadfastly has recognized Congress' intent to establish a uniform, national labor law through its enactment of the NLRA. *See, e.g., Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986) ("[I]n passing the NLRA, Congress largely displaced state regulation of industrial relations."); *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967) ("The National Labor Relations Act is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such it is of course the law of the land which no state law can modify or repeal.").

A cornerstone of Congress' design is the NLRB's primary jurisdiction to regulate conduct that is arguably protected or prohibited by the NLRA. "It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. ... When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to exclusive competence of the National Labor Relations Board if the danger of state interference with National policy is to be averted." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245 (1959).

The preemption doctrine elucidated by this Court in *Garmon* and its progeny thus "protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 748 (1985) (citation omitted). *See also Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986) ("The *Garmon* rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of 'the integrated scheme of regulation' established by the NLRA.") (citation omitted).

B. Pennsylvania Undermines The Primary Jurisdiction Of The NLRB Over Arguable Unfair Labor Practices By Creating Conflicting Standards For Bad-Faith Bargaining.

By affirming the Unemployment Board's award of unemployment benefits on the basis of Keystone's alleged bad-faith bargaining, the Commonwealth Court of Pennsylvania usurps the primary jurisdiction of the NLRB to determine whether an employer negotiated in bad faith.

In upholding the Unemployment Board's finding that the Teamsters' work stoppage was a "lockout" and not a strike under § 402(d), and the Company's employees were entitled to benefits, the Commonwealth Court of Pennsylvania held that the Unemployment Board "*act[ed] within its prerogative*" in determining that Keystone's final offer was ratified "*based upon misrepresentations and bad faith by the Employer,*" and "therefore conclud[ing] that the resulting agreement claimed to exist by Employer was of no legal effect." App. 13a (emphasis added).

The NLRB was established, in part, to ascertain when bad-faith collective bargaining -- prohibited by Sections 8(a)(1) and 8(a)(5) of the NLRA (29 U.S.C. §§ 158(a)(1), (a)(5)) -- has occurred. *See, e.g., Garmon*, 359 U.S. at 244-245. The NLRB, however, made no finding whatsoever that Keystone negotiated in bad faith. App. 10a - 14a. Rather, the Unemployment Board awarded benefits based

upon its own standards for determining bad-faith bargaining, independent of any adherence to the NLRB's precepts.

The Commonwealth Court of Pennsylvania's endorsement of the Unemployment Board's power to develop its own bad-faith bargaining standards results in the very balkanization of labor law that Congress sought to prevent. This Court has underscored that an important justification for the *Garmon* preemption doctrine is "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose." *Vaca v. Sipes*, 396 U.S. 171, 180-181 (1967). *See also Garner v. Teamsters Local 776*, 346 U.S. 485, 490 (1953) (NLRB primary jurisdiction doctrine is "necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.").

Because of the decision below, the conduct and statements by employers negotiating with unions in Pennsylvania, including employers engaged in multistate negotiations covering employees in numerous jurisdictions, are subject to precisely the "local ... attitudes toward labor controversies" that the NLRB's primary jurisdiction was designed to overcome. These employers will be required to adhere to Pennsylvania's idiosyncratic bad-faith bargaining standards, or otherwise will find themselves financing

unemployment benefits if a work stoppage arises during labor negotiations, and thereby likely prolonging the labor dispute. The existence of competing standards for regulating conduct at the negotiating table will create confusion, will deter employers from undertaking approaches to bargaining which fully comply with well-established NLRB doctrine, and will upset the balance of power between labor and management that Congress sought to create in the NLRA.

C. Other States Also Award Unemployment Benefits On The Basis Of Their Determination That The Employer Has Bargained In Bad Faith.

Pennsylvania is not alone in frustrating the intent of Congress to establish a uniform, national labor law by granting unemployment benefits based on its determination that the employer negotiated in bad faith.

Many states have statutes similar to Pennsylvania's under which unemployment benefit eligibility is premised upon a finding regarding the cause of a labor dispute, *i.e.*, whether a work stoppage is a "strike" or a "lockout." *See, e.g.*, Ark. Code Ann. § 11-10-58(a); Fla. Stat. ch. 443.101(4)(b); Ga. Code Ann. § 34-8-194(4)(C); Ky. Rev. Stat. Ann. § 341.360(1); Md. Code Ann., Lab. & Empl. § 8-1004(a)(1); Mass. Gen. Laws ch. 151A, § 25; N.H. Rev. Stat. Ann. § 282-A:36 (II-a); Minn. Stat. § 268.09, subd. 18(c)(2); Ohio Rev. Code Ann. § 4141.29(D)(1)(a); Okla. Stat. tit. 40, § 2-410(2)(c); Or. Rev. Stat. § 657.200(3);

S.D. Codified Laws § 61-6-19(3); Wis. Stat. § 108.04. To the extent a state purports to independently determine the legality of a labor dispute, however, it usurps the NLRB's primary jurisdiction to regulate the conduct of labor and management.

At least seven other states -- Alaska, Arizona, Delaware, Mississippi, Montana, Utah, and West Virginia -- have provisions under which unemployment benefit eligibility turns upon the state's idiosyncratic determination of whether the employer bargained in bad faith or committed other arguable unfair labor practices.

See Alaska Stat. § 23.20.383(b)(2) ("[No benefit disqualification occurs if] the department finds ... the labor dispute is caused by the failure or refusal of the employer to comply with ... a state or federal law pertaining to hours, wages, or other conditions of work."); Ariz. Rev. Stat. § 23-777(B) ("If the commission, upon investigation, finds that the dispute, strike or lockout is caused by the failure or refusal of an employer to conform to the provisions of an agreement or contract between an employer and employee, or a law of this state or of the United States pertaining to hours, wages or other conditions of work, such dispute, strike or lockout shall not render the workers ineligible for benefits."); Del. Code Ann. tit. 19, § 3315(4)(c) ("For any week with respect to which the Department finds ... [t]he employing unit has refused to permit work to continue and maintain the status quo for a reasonable time pending further negotiations.");

Miss. Code Ann. § 71-5-513(A)(4)(a) ("For any week with respect to which the commission finds that his total unemployment is due to a stoppage of work ... provided, that this subsection shall not apply if it is shown to the satisfaction of the commission ... [h]e is unemployed due to a stoppage of work occasioned by an unjustified lockout[.]"); Mont. Code Ann. § 39-51-2305(a)(3) ("If the department, upon investigation, shall find that such labor dispute is caused by the failure or refusal of any employer to conform to the provisions of any law of the state wherein the labor dispute occurs or of the United States pertaining to collective bargaining, hours, wages, or other conditions of work[.]"); Utah Code Ann., § 35A-4-405(4)(a) ("[I]f the division finds that the strike is caused by the failure or refusal of any employer to conform to the provisions of any law of the state or of the United States pertaining to hours, wages, or other conditions of work, the strike shall not render the workers ineligible for benefits."); W. Va. Code § 21A-6-3(4) ("For a week in which his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute [the claimant shall be disqualified]... unless the commissioner is satisfied that ... employees are denied the right of collective bargaining under generally prevailing conditions.").[2]

---

[2] In contrast, the unemployment compensation statutes of Illinois and Missouri explicitly recognize the NLRB's primary jurisdiction. *See* 820 Ill. Comp. Stat. § 604 ("For (continued...)

Similarly, the Colorado Court of Appeals has held that unemployment benefits may be awarded to strikers based on the state industrial commission's determination that the employer engaged in bad-faith bargaining or other arguable unfair labor practices. *See Central Drywall Co., Inc. v. Industrial Commission*, 724 P.2d 685, 686 (Col. Ct. App. 1986) (applying Colo. Rev. Stat. § 8-73-108(4)).

Thus, the question presented by the petition has broad significance. The unemployment compensation statutes of a number of states are in conflict with the NLRB's primary jurisdiction over arguable unfair labor practices.

(...continued)
purpose of disqualification under this Section the term 'labor dispute' does not include a lockout by an employer for any week during which ... there is a final adjudication under the National Labor Relations Act that during the period of the lockout the employer has refused to bargain in good faith with the recognized or certified collective bargaining representative of the locked-out employees over issues giving rise to the lockout[.]"); Mo. Rev. Stat. § 288.040 6.(2) ("Such employees shall not be eligible for waiting week credit or benefits during the period when the strike is in effect, regardless of diminution, unless the employer has been found guilty of an unfair labor practice by the National Labor Relations Board or a federal court of law for an act or actions preceding or during the strike.")

D. This Court's Unsettled Pronouncements In The Unemployment Compensation Area Have Left The States Free To Encroach Upon The Primary Jurisdiction Of The NLRB.

This Court's unsettled pronouncements in the unemployment compensation area have left the states free to create their own individualized standards for bad-faith bargaining -- distinct from the NLRB's -- and to rely upon them in determining benefit eligibility. As a result, the NLRB's primary jurisdiction has been compromised.

In a plurality opinion by Justice Stevens with two Justices concurring and three Justices concurring in the result, this Court held in *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979), that Congress, in enacting the NLRA and the Social Security Act, did not intend to prevent a state from granting unemployment compensation to strikers.[3]

The question presented in *New York Telephone* was "whether the National Labor Relations Act, as amended, implicitly prohibits the State of New York from paying unemployment compensation to strikers." *Id.* at 522. This

---

[3] Justices White and Rehnquist concurred in Justice Stevens' opinion, with Justices Blackmun, Brennan, and Marshall specially concurring in the judgment. Chief Justice Burger and Justices Powell and Stewart dissented.

Court, in *New York Telephone*, did not purport to decide whether the NLRB's primary jurisdiction preempts a state from awarding unemployment compensation benefits based upon its own determination -- independent of the NLRB's standards and findings -- that the employer engaged in bad-faith bargaining.

Rather, in his plurality opinion, Justice Stevens expressly emphasized that "there is no claim [in *New York Telephone*] that New York has sought to regulate or prohibit any conduct subject to the regulatory jurisdiction of the Labor Board under § 8 [of the NLRA]." *Id.* at 529 (footnote omitted). Had such a contention been made, Justice Stevens and the two Justices concurring in his opinion apparently would have held that the state's action was preempted by the NLRB's primary jurisdiction. *Id.*, fn. 15 ("Because [petitioner's contention that the NLRA forbids the states from awarding benefits to participants in illegal strikes] would inevitably involve the States in ruling on the legality of strikes under § 8, it would invite precisely the harms that the pre-emption doctrine is designed to avoid.").

This case presents the contrasting facts that Justice Stevens underscored in *New York Telephone*. Here, Pennsylvania has sought to regulate conduct "subject to the regulatory jurisdiction of the Labor Board under § 8 [of the NLRA]." Here, Pennsylvania has granted unemployment benefits on the basis of its independent determination that

Keystone committed an arguable unfair labor practice, *i.e.*, negotiated in bad faith.

Because Justice Stevens' opinion did not command assent from a majority of the Justices, this Court left unsettled in *New York Telephone* the relationship between the NLRB's primary jurisdiction over arguable unfair labor practices and state unemployment compensation schemes.

Accordingly, Pennsylvania and other states maintain unemployment compensation statutes which undermine the NLRB's primary jurisdiction by permitting these states to make independent determinations regarding conduct which arguably constitutes an unfair labor practice. As a result, Congress' intent to fashion a uniform, national labor law administered by the NLRB has been frustrated.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

BRADFORD L. LIVINGSTON
Counsel of Record
JEFFREY C. KAUFFMAN
JOSHUA L. DITELBERG
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Attorneys for Petitioner
55 E. Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

JULY 1998

APPENDIX

APPENDIX A

APRIL 24, 1998 ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR ALLOWANCE OF APPEAL.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

KEYSTONE COCA-COLA BOTTLING CORPORATION,

Petitioner

No. 504 M.D. Alloc. Dkt. 1997
Petition for Allowance of Appeal from Order of the Commonwealth Court

v.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,

Respondent.

ORDER

PER CURIAM

AND NOW, this 24th day of April, 1998, the Petition for Allowance of Appeal is denied.

APPENDIX B

ORDER OF COMMONWEALTH COURT OF PENNSYLVANIA DENYING APPLICATION FOR REARGUMENT ISSUED JUNE 4, 1997.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

KEYSTONE COCA-COLA BOTTLING CORPORATION,

Petitioner

v.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,

Respondent

Nos. 1568 C.D. 1995 through 1640 C.D. 1995 and 2103 C.D. 1995

ORDER

NOW, June 4, 1997, having considered petitioner's application for reargument, the application is denied.

BY THE COURT:

s/ James Gardner Collins,
President Judge

APPENDIX C

OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DECIDED APRIL 11, 1997.

KEYSTONE COCA-COLA BOTTLING CORPORATION,

Petitioner

v.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,

Respondent

Commonwealth Court of Pennsylvania

Argued Dec. 13, 1996.
Decided April 11, 1997.
Reargument Denied June 4, 1997.

* * *

Jeffrey C. Kauffman, Chicago, IL for petitioner.

Judith M. Gilroy, Harrisburg, for respondent.

Before SMITH and FRIEDMAN, JJ., and MIRARCHI, Jr., Senior Judge.

SMITH, Judge.

Keystone Coca-Cola Bottling Corporation (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that reversed the decision of a referee denying benefits to William D. Williams, the representative Claimant and member of Teamster's Local #401 (Union). Benefits were denied by the referee under the work stoppage provisions of Section 402(d) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(d). Employer questions whether the Board erred and acted outside of its jurisdiction in determining that Employer engaged in bad faith bargaining and whether this determination was supported by substantial evidence; whether the Board erred in determining the validity of the parties' 1994-1999 collective bargaining agreement; whether the parties established the status quo by operating under new terms and conditions of employment for a period of eight months from March to November 1994; and whether Claimant was eligible for benefits when the Union engaged in a strike and refused to operate under the status quo.

I.

On August 26, 1991, Joseph Gorham, the Union's Secretary/Treasurer, and Robert Palo, Employer's Vice President of Human Resources, agreed to extend the existing collective bargaining agreement between the parties which expired on September 10, 1991, subject to the right of either party to serve a 72-hour notice upon the other to terminate

the extension agreement. More than two and one-half years later, on or about March 18, 1994, Employer gave notice to the Union that it intended to terminate the August 1991 extension agreement. Three to four days later, Gorham was informed that Palo had a new proposal for the employees' pension plan and other items negotiated. The pension plan proposal provided for a reduction of Employer's contribution for each employee from $134.34 per month to $50 per month, to end December 31, 1998.

Gorham presented the entire new proposal to the Union on March 26, 1994, based upon Palo's representations that the reduced pension contribution amount was acceptable to the Central Pennsylvania Teamsters Pension Fund and had been approved by the Acting Administrator of the Fund, Joe Samolovich. The Union membership voted to ratify the proposal by a vote of 41 to 40, which included two absentee ballots. Certain vote issues surfaced and were to be resolved by the International Office of the Union; however, before the issues could be resolved, Gorham discovered that the Teamster's Pension Fund would not permit the pension changes nor accept the $50 monthly contribution per employee and that Samolovich, in fact, had not approved the pension proposal as indicated by Palo. Gorham thereafter informed Palo that there was no ratified agreement because Palo was unable to deliver on the pension proposal. At a meeting convened by the Pension Fund administrator, trustees and attorneys, Palo was informed that the trustees could not accept a reduction in pension contributions because

of the adverse impact upon the membership at the time of retirement.

In October 1994, Employer unilaterally implemented changes consistent with the proposal voted upon by the Union membership, which also included a change in the method of computing Claimant's compensation from an $11.26 hourly rate to a $10 per hour base pay plus commission on products sold. Gorham and Palo corresponded through November 1994 in an effort to resolve the dispute, while Gorham simultaneously asserted that the Union's ratification vote was invalid, that the Union wanted to resume negotiations and that the Union was willing to return to the terms and conditions of the August 1991 extension agreement as negotiations continued. Palo's position was that a labor-management agreement was entered into as of the date of the ratification vote and that the only unresolved issue was the pension contribution amount. Because Gorham and Palo were unable to resolve mattes, the Union voted to strike on November 17, 1994, and on November 21, 1994, the Union commenced its work stoppage. Thereafter, Claimant applied for unemployment benefits.

The Wyoming Valley Job Center determined that Claimant was not entitled to benefits because the work stoppage was a strike. Claimant appealed, and the referee affirmed the Job Center. On further appeal, the Board reversed the referee and made the following pertinent findings of fact:

56. The strike vote was caused in large measure by the employer's implementation of the disputed March 26, 1994, agreement in mid-October 1994.

57. The work stoppage began on or about November 21, 1994; however, the union contacted Palo by letter and indicated to the company that the union was willing to cease its picketing activity and return to work again, as it continually and consistently expressed to the company under the terms and conditions of the extension agreement of August 26, 1991. The union indicated that they were not in violation of any agreement and that it felt its activity was protected because of the issuance of a complaint by the NLRB for bad faith bargaining. The letter also registered the union's displeasure by the actions of the company to hire permanent replacement workers.

Board Decision, pp. 4-5.

The Board stated that Employer's proposal was never properly or legally ratified, was never reduced to a formal written contract and was never signed by the parties. It further stated that ratification of the proposal was based upon Employer's misrepresentations at the bargaining table, resulting in the Union's filing a National Labor Relations

Board (NLRB) complaint. In ruling that Claimant was eligible for benefits, the Board determined that Employer breached the status quo that was established by the August 1991 extension agreement, and when Employer, relying on the ratification vote, changed the employees' method of compensation, Employer changed the status quo. This unilateral action by Employer was taken despite the Union's offer to return to work under the status quo. Consequently, the Board held that the Union sustained its burden under Section 402(d) of the Law by proving that the work stoppage emanated from a lockout rather than a strike.

II.

Section 402 of the Law provides in pertinent part as follows: "An employee shall be ineligible for compensation for any week . . . (d) In which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he is or was last employed.... ." The Pennsylvania Supreme Court developed the following test for determining whether a dispute is a lockout or a strike:

> Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the

> preexisting terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contact and maintain the status quo, then the resulting work stoppage constitutes a "lockout" and the disqualification for unemployment compensation benefits in the case of a "stoppage of work because of a labor dispute" does not apply.

Vrotney Unemployment Compensation Case, 400 Pa. 440, 444-445, 163 A.2d 91, 93-94 (1960).

In *Philco Corp. v. Unemployment Compensation Board of Review*, 430 Pa. 101, 242 A.2d 454 (1968), the Supreme Court refined the *Vrotney* test to require a determination as to which side "first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing." *Id.*, 430 Pa. at 103, 242 A.2d at 455. The term "status quo" has been defined as the last actual, peaceable and lawful, uncontested status that preceded the controversy, and in determining the status quo, courts must focus on those pre-existing terms and conditions of employment that were contained in the expired contract. *See Miceli v. Unemployment Compensation Board of Review*, 519 Pa. 515, 549 A.2d 113 (1988).

Where the work stoppage takes the form of a strike and a constructive lockout is asserted by the union, it is the burden of the union to demonstrate its willingness to maintain the status quo and the employer's refusal to do so. *Stanley*

Flagg and Co., Inc. v. Unemployment Compensation Board of Review, 146 Pa.Cmwlth. 248, 605 A.2d 443, *appeal denied*, 532 Pa. 648, 614 A.2d 1144 (1992). In this regard, the Court reiterated in *Murdoca v. Unemployment Compensation Board of Review*, 122 Pa.Cmwlth. 303, 551 A.2d 1157 (1988), citing *Miceli*, that compensation authorities must determine the cause of a work stoppage before an award of benefits may be made.

When the party with the burden of proof in a Section 402(d) case has prevailed before the Board, its findings of fact are conclusive on this Court so long as the record, taken as a whole, contains substantial evidence to support those findings. *Babcock & Wilcox Co. v. Unemployment Compensation Board of Review*, 119 Pa.Cmwlth, 566, 547 A.2d 850 (1988), *appeal denied*, 523 Pa. 637, 565 A.2d (1989). This Court's scope of review of the Board's decision here is limited to determining whether the findings of fact are supported by substantial evidence, whether errors of law were committed or whether constitutional rights were violated. *Stanley Flagg and Co., Inc.*

III.

Employer initially argues that the Board committed error and acted outside of its jurisdiction when it determined that Employer engaged in bad faith bargaining and that even if the Board possessed jurisdiction to make this determination, it was not supported by substantial evidence.

Employer maintains that the Board's decision improperly focuses in large part upon the issuance of the NLRB complaint, which was excluded from the record by the referee on relevancy grounds. According to the Employer, the mere act by the Board of engaging in what Employer characterizes as "deciding an unfair labor practice" violates the pre-emption doctrine. This Court has held, however, in *Schulmerich Carillons, Inc. v. Unemployment Compensation Board of Review*, 154 Pa.Cmwlth. 343, 623 A.2d 921, *appeal denied*, 535 Pa. 642, 631 A.2d 1013 (1993), and *cert. denied*, 510 U.S. 1113, 114 S.Ct. 1057, 127 L.Ed.2d 378 (1994), that the application of Section 402(d) in unemployment proceedings is not preempted by federal labor law, and an award of unemployment benefits to locked-out employees is not an impermissible encroachment upon the NLRB's regulation of collective bargaining.

In order to determine a claimant's eligibility for benefits under Section 402(d), unemployment authorities must necessarily make findings as to the nature of the work stoppage (strike or lockout), the status quo extant immediately preceding the work stoppage and whether the claimant satisfied his or her burden of proving a willingness to continue to work under the status quo. These factual determinations are not only authorized but are mandated by court decisions that require unemployment authorities to determine the circumstances and conditions surrounding a work stoppage, whether those circumstances and conditions represent a strike or lockout, what conditions reflect the last

actual, peaceable, uncontested status between the parties and whether the claimant has satisfied the burden imposed under Section 402(d), before eligibility may be determined. *See Miceli; Philco; Vrotney; Murdoca*. Employer's pre-emption arguments are unsupported by case law and are therefore rejected by the Court.[4]

To support its position that the Board erred in determining the validity of the 1994-1999 collective bargaining agreement, Employer repeats its argument that the Board lacked jurisdiction to decide whether bad faith bargaining occurred, and it also asserts that the fact that the ratified proposal had not been reduced to writing and signed has no legal significance. This latter position is based upon a March 18, 1994 memorandum of agreement between the parties that Employer's proposal would become effective upon ratification by the Union membership. Employer further states that it was unnecessary for the Board to

---

[4] The representation made by Employer that the Board's decision improperly focuses in large measure on the Union's filing an NLRB complaint is totally unsupported by the record. The Board made references to the complaint but nowhere in the Board's opinion does it indicate that its determination that Employer engaged in misrepresentations and bad faith bargaining was based upon the Union's having filed its unfair labor practices complaint. The Board made fifty-eight findings of fact and presented a thorough discussion of its reasoning, and the only references to the Union's NLRB complaint were to note that one had been filed and that no hearing had been held on the complaint.

determine the validity of the 1994-1999 collective bargaining agreement because the parties established the status quo by operating under terms and conditions of the ratified proposal for eight months, from March to November 1994. Employer's arguments are unavailing because the Board, acting within its prerogative, found that the proposal was ratified based upon misrepresentations and bad faith bargaining by Employer and therefore concluded that the resulting agreement claimed to exist by Employer was of no legal effect.

The record supports the Board's findings that the Union continued to dispute its ratification of the proposal as effecting a valid collective bargaining agreement and that his purported agreement was not uncontested. Based upon evidence of Gorham's refusal to sign the ratified proposal until the disputed vote was resolved by the International Office, Gorham's subsequent discovery of Employer's misrepresentations concerning the pension fund proposal and Gorham's consequent rejection of the Union's ratification vote, Employer's claim that the Union acquiesced in the terms of the ratified proposal is simply not supported by the record. The principle that performance is acceptable does not fit this case; the cases cited by Employer, *Lewis v. Unemployment Compensation Board of Review*, 187 Pa. Superior Ct. 109, 144 A.2d 588 (1958), and *Grzech v. Unemployment Compensation Board of Review*, 56 Pa.Cmwlth. 9, 423 A.2d 1364 (1981), which enunciate this principle are therefore distinguishable and inapposite.

Citing authority from *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832 (1953), Employer challenges the Board's power to invalidate the entire purported contract between the parties merely because a dispute or misunderstanding existed over the pension contribution issue. It is true that the Supreme Court in *Rockaway News* stated that a contract should not be removed from the hands of the parties where they simply "misunderstand" the legal limits of their bargain and that the excess provisions may be severed and invalidated, but not the entire contract. Nevertheless, that situation does not exist here, where the Board found that Employer's misrepresentations and bad faith bargaining tainted the ratification vote; it did not find that a misunderstanding between the parties tainted the vote. On this critical issue, the Supreme Court further stated in *Rockaway News* that there may be cases where a forbidden provision is so basic to and intertwined with the entire contract that it must stand or fall as a whole. The Board decided this precise point in favor of the Union.

Finally, the Court rejects Employer's argument that the Board erred in concluding that the work stoppage was a lockout rather than a strike. Employer posits that the Union ratified the March 1994 proposal despite Gorham's warning to the Union membership concerning the feasibility of the pension proposal, that the Union membership received and cashed a ratification bonus and never offered to return the funds and that the membership performed under the terms of

the ratified proposal for eight months and enjoyed its benefits. Consistent with this view, Employer claims that, contrary to the situation in *Murdoca*, where the employer unilaterally changed the wage structure during the current labor contract, Employer merely acted to implement terms of ratified proposal for eight months and enjoyed its benefits. Consistent with this view, Employer claims that, contrary to the situation in *Murdoca*, where the Employer unilaterally changed the wage structure during the current labor contract, Employer merely acted to implement terms of the ratified proposal by changing the employees' method of compensation. According to Employer, it repeatedly offered to resolve the pension issue and to continue union terms of the ratified proposal, but the Union insisted that the parties return to terms and conditions of the August 1991 extension agreement; by virtue of its work stoppage, the Union changed the status quo.

The Board accepted the testimony of Gorham as more credible than that of Palo, and, as the ultimate fact finder, the Board was free to accept or reject the testimony of any witness in whole or in part. *Greif v. Unemployment Compensation Board of Review*, 68 Pa.Cmwlth. 437, 450 A.2d 299 (1982). After evaluating the evidence and determining the credibility of witnesses, the Board determined that the status quo or last actual, peaceable and uncontested status between the parties was the August 1991 extension agreement, that Employer changed the status quo by its unilateral action in changing the method of

compensation and that the Union was willing to continue to work under the status quo but that Employer refused to agree. The Court is of the opinion that the Board's findings of fact are supported by substantial evidence, and, consistent with case law, they are conclusive upon appellate review by this Court. For the reasons stated, the Court affirms the order of the Board that Claimant is not ineligible for benefits under Section 402(d) of the Law.

ORDER

AND NOW, this 11th day of April, 1997, the order of the Unemployment Compensation Board of Review is affirmed.

APPENDIX D

DECISION AND ORDER OF THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW DATED MAY 31, 1995.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

APPEAL NO. H-95-8-K-53
E.B. ACCT. NO. 198-40-7722
DECISION NO. B-337037
ORDER MAILING DATE MAY 31, 1995

WILLIAM D. WILLIAMS ET AL.
66 PROSPECT STREET
WILKES BARRE PA 18702

KEYSTONE COCA COLA BOTTLING CORP.
300 OAK STREET
PITTSTON PA 18640

FINDINGS OF FACT:

1. For purposes of this appeal, claimant was last employed by the Keystone Coca-Cola Bottling Corporation (company or employer) at a final

rate of pay of $10.75 per hour, and his last day of work was November 18, 1994.

2. Since 1990, Teamster's Local #401 (union) had a collective bargaining relationship with employer.

3. Mr. Joseph Gorham (Gorham) was employed by the union as Secretary/Treasurer and Business Agent. He was chief negotiator for the union.

4. Mr. Robert Palo (Palo) was the employer's Vice President of Human Resources in Industrial Relations. He was chief negotiator for the company.

5. An existing collective bargaining agreement between the union and company expired on September 11, 1991.

6. On August 26, 1991, prior to the expiration of the aforementioned contract, the parties came to an agreement concerning an extension of that collective bargaining agreement.

7. The terms of the existing contract were extended until such time that either party served 72-hour notice upon the other to terminate the agreement.

8. By correspondence handed to the union on or about March 18, 1994, 72-hour notice was provided by employer of its intent to terminate the extension agreement of August 26, 1991.

9. Between August 26, 1991, and March 18, 1994, numerous (15-20) negotiating sessions between the union and employer had been unsuccessfully conducted.

10. The last negotiating session between the union and the company was held on March 15, 16, and 17, 1994, and the parties failed to resolve their differences relative to the negotiating process.

11. At this last session, it was indicated to the union by the company that the company intended to hand across the table a final offer and that they would not leave the bargaining table until it had handed the union its final offer.

12. At that final session, the company presented to the union a packet which was the embodiment of the final offer to take to the membership for ratification. The agreement would also give the employees a signing bonus if the contract was ratified by March 21, 1994.

13. Key issues (pension, health and welfare, hourly rates, changes in the method of delivery of product, changes in work week scheduling) remained open and unresolved.

14. The bargaining meeting began on March 17, 1994, and ran until 4:00 or 5:00 a.m. with the company taking the position that this was, using their own terms, the final offer. The company wanted the package voted upon and either ratified or rejected by March 21, 1994.

15. The union presented the employer's "final offer" to the membership on or about March 21, 1994.

16. The membership rejected the proposal by a vote of 68 to 12, with a recommendation of a strike action to be taken against the employer.

17. Gorham notified Palo on the evening of March 21, 1994, that the contract offer presented was rejected by the employees and that a strike vote had been taken.

18. A discussion between Gorham (union) and Palo (employer) ensued pertaining to the problems of obtaining a new contract. Gorham reiterated the same concerns he had about the issues, including the pension issue.

19. Palo indicated that he may have a "game plan" so as to fix the problem with the pension.

20. Gorham indicated to Palo his intent to strike him "whenever he wanted to" but he indicated he was willing to continue to negotiate with the company as long as he felt there was any hope of coming to an agreement.

21. At that time, the union was working under the terms and conditions as indicated in the contract that expired on September 11, 1991, as covered by the extension agreement of August 26, 1991.

22. During the week of March 21 through March 26, 1994, the union and employer had numerous discussions, and Gorham was updated by Palo relative to his discussions with the Pennsylvania Teamster's Pension Fund (fund).

23. On March 23 or 24, 1994, Palo indicated to Gorham that he had a new proposal on the pension plan and some of the other issues they had discussed.

24. Palo informed Gorham of the proposal, and Gorham, for the union, indicated that he did not believe it was possible that the fund would allow the proposal but Palo should put it in writing,

fax it to him, and he would place it before the membership for a vote, but it would be the last time to vote on a final offer.

25. The pension proposal provided that the monthly contribution amount made by employer would be reduced from the then $134.34 per employee per month to $50.00 per employee per month for a period to end December 31, 1998.

26. Palo indicated to Gorham that he had spoken to Joe Samolovich (Samolovich), who was then Acting Administrator of the fund, that Samolovich and Palo had been in contact with Attorney Sabatino to discuss the plan, and the proposal Palo faxed to Gorham had been approved. Palo informed Gorham that the pension proposal was acceptable to the fund.

27. Gorham presented the proposal to the membership on March 26, 1994. Presentation was made based upon representations by Palo that the pension proposal was acceptable to the fund.

28. Upon opening two absentee ballets, the proposal was ratified by a vote of 41 to 40.

29. Two members had contacted union leadership that they allegedly had not been properly notified of the ratification meeting.

30. Gorham requested guidance from the International as to whether any notification procedures had been violated or if it was the position of the International to have the contract revoted.

31. As of the date of the evidentiary hearing, February 22, 1995, Gorham, on behalf of the union, had not signed the proposal even though being continually urged to do so by Palo.

32. Gorham informed Palo he would not sign until the International resolved the disputed vote. Before this occurred, Gorham learned that the fund would not allow the pension changes and would not accept the $50.00 per month per employee contributions.

33. Gorham received notice that the $50.00 per employee per month pension contributions for the employees were being escrowed, and the $50.00 was not being credited to the members' accounts.

34. Gorham spoke with Samolovich who indicated to Gorham that the money was being escrowed because the fund would not accept the money and that he, Samolovich, never discussed the reduction of the contribution amounts with Palo from $134.34 to $50.00 as he had no authority to discuss that as the authority rested with the trustees of the fund alone.

35. Gorham contacted Palo to discuss the matter and indicated to him that there was no ratified agreement inasmuch as Palo was unable to deliver on the proposal regarding the pension contributions, maintaining that the "agreement" should be renegotiated.

36. The proposal which the membership had ratified was done as a whole, not in part, and not piecemeal.

37. Palo succeeded in having a meeting set up with the fund administrators trustees, and attorneys. The trustees indicated that they could not accept the reduction in contributions from $134.34 to $50.00 because it would have an adverse impact on the employee membership at the time they retired and attempted to collect their pension.

38. On August 8, 1994, the union filed an unfair labor charge with the National Labor Relations Board (NLRB) which issued a complaint; and as of the date of the evidentiary hearing, the parties were awaiting the scheduling of a hearing before an Administrative Law Judge.

39. Through the period of September, October and November 1994, Gorham remained in contact with Palo, indicating to him at each and every contact that the proposal that was ratified on March 26, 1994, was not valid. Gorham, on behalf of the union, informed Palo, employer's representative, that it wished to return to what they considered the last legal contractual agreement -- the terms of the August 26, 1991, extension agreement.

40. The union was willing to return to those August 26, 1991, terms at any time that the company would see fit, and they would continue to negotiate a new collective bargaining agreement.

41. On or about October 15, 1994, the company implemented changes consistent with the terms of the March 26, 1994, ratified proposal.

42. Under the old, extended contract, employees were paid $11.26 an hour and time and a half

after eight hours regardless of the nature of the work.

43. Effective mid-October 1994, the delivery and pay system was radically changed pursuant to the ratified March 26, 1994, proposal with the new system requiring a $10.00 per hour base pay guarantee and commission on products sold as indicated (approximately 34 cents a case on all products delivered). The new system made no allowance for any payment for overtime or any payment for any delay times that the employees may incur, other than the $10.00 base pay.

44. By correspondence dated November 4, 1994, Gorham again indicated to the employer that the March 26, 1994, ratification of the proposed collective bargaining agreement was invalid and that the union wished to resume contract negotiations with the company in the hopes of finding a mutually acceptable collective bargaining agreement.

45. In that same correspondence sent November 4, 1994, the union indicated that it would be willing to return to the terms and conditions as provided for in the extension agreement of August 26, 1991; it would return

unconditionally under those terms and conditions while they continued to bargain.

46. The union received correspondence from employer and Palo dated November 7, 1994, wherein he indicated that it was their position that there was an existing labor-management agreement as ratified on march 26, 1994, and that the only clause that had to be "fixed" was the pension issue.

47. Gorham and the union sent correspondence dated November 10, 1994, to the employer in which they reaffirmed the position of Local #401 that the proposal that was implemented by the company as of March 26, 1994, was invalid. The union indicated that working under the terms and conditions of that implemented proposal were extremely negative and unlivable.

48. The union, again, in that November 10, 1994, letter indicated that it desired to return to work under the terms and conditions of the last legal and bona fide collective bargaining agreement, as provided in the extension agreement of August 26, 1991.

49. Employer responded to the November 10, 1994, letter by indicating that there was a ratified

agreement effective March 26, 1994, with the pension issue being the only issue unresolved.

50. Employer has steadfastly refused to permit the union to work under the terms of the last bona fide collective bargaining agreement (August 26, 1991, extension agreement) as the company continued to insist that the ratified proposal of March 26, 1994, was legal and valid.

51. The union met with the company on November 17, 1994, and the company was locked into the position that there was a contract in place as of March 26, 1994; the company was willing to discuss only the changing of the method of delivery and making changes to the pension plan.

52. The company did not offer to return to the terms and conditions contained in the extension agreement of August 26, 1991.

53. The union offered to continue to work under the terms and conditions of the last bona fide agreement -- the extension agreement of August 26, 1991.

54. After the aforementioned meeting of November 17, 1994, the union held a meeting of its

membership) and based upon the company's intractable position and the fact that the union had done everything possible "that it could to get the company to return to the last legal bona fide mutually recognized collective bargaining agreement (extension agreement of August 26, 1991), a strike vote was taken.

55. The conditions deteriorated between the employer and the union at the Pittston facility to the point where the conditions of employment were unbearable. The union struck against employer.

56. The strike vote was caused in large measure by the employer's implementation of the disputed March 26, 1994, agreement in mid-October 1994.

57. The work stoppage began on or about November 21, 1994; however, the union contacted Palo by letter and indicated to the company that the union was willing to cease its picketing activity and return to work again, as it continually and consistently expressed to the company under the terms and conditions of the extension agreement of August 26, 1991. The union indicated that they were not in violation of any agreement and that it felt its activity was

protected because of the issuance of a complaint by the NLRB for bad faith bargaining. The letter also registered the union's displeasure by the actions of the company to hire permanent replacement workers.

58. Claimants then made their applications for unemployment compensation and filed claims for benefits.

DISCUSSION: The local Job Center issued determinations denying benefits to the claimants. The claimants filed appeals therefrom, and following a hearing at which the claimants, represented by counsel, their union representative, and witnesses for employer, with counsel, appeared and testified, the Referee issued a decision and orders affirming the Job Center's determinations. Thereafter, the claimants filed further appeals from the Referee's decision and orders.

Section 402(d) of the Law provides that a claimant shall be ineligible for benefits for any week in which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he is or was last employed: Provided, That this subsection shall not apply if it is shown that (1) he is not participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (2) he is not a member of an organization which is participating in, or directly interested

in, the labor dispute which caused the stoppage of work; and (3) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurred, any of whom are participating in, or directly interested in, the dispute.

Unless the lockout exception applies, a claimant is ineligible for benefits under Section 402(d) unless he can meet the three conjunctive tests set forth therein.

Reference to said three tests clearly shows that unless the lockout exception is applicable to the present factual situation, the claimant and those similarly situated would be ineligible for unemployment compensation benefits because the bargaining unit employees could not meet any one, let alone all three, of said conjunctive tests. The issue before the Board is the applicability or inapplicability of the lockout exception of Section 402(d) to the present case.

The Supreme Court of Pennsylvania provided the test to distinguish between a "strike" and a "lockout" as follows:

> Have the employees offered to continue working for a reasonable time under the preexisting terms and conditions of the employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue

> for a reasonable time under the preexisting terms and conditions of the employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lockout" and the disqualification for unemployment compensation benefits is the case of a "stoppage of work because of a labor dispute" does not apply.

Erie Forge and Steel Corporation v. Unemployment Compensation Board of Review (Vrotney), 400 Pa. 440, 163 A.2d 91 (1960).

Of equal importance is the rationale for the status quo requirement which is that during the interim period between contracts, the employer may continue operations and the employees may continue working while the parties are free to negotiate on an equal basis in good faith. Maintenance of the status quo is merely another way of stating that the parties must continue the existing relationship in effect at the expiration of the old contract. *Vrotney*.

The Board understands and appreciates the arguments advanced by the employer, with respect to claimants' eligibility, during the period at issue. The Board, however, finds the claimants' arguments to be particularly persuasive. Gorham was employed by Teamster's Local #401 as Secretary/Treasurer and Business Agent and acted as chief

negotiator in this instance. Palo was Employer's Vice President of Human Resources and was chief negotiator for the company. These two individuals appeared and testified, at some length, and were subject to cross-examination as to the circumstances surrounding the labor dispute in this instance. To the extent that the testimony conflicted, the Board found the union's representative's testimony to be more credible and persuasive, and utilized same in drafting the above Findings. Doing so and based upon those Findings, the dispute at issue, for the period at issue, must be characterized a lockout.

The Board agrees with the union that this matter does posit an issue of first impression before this Board. The Board also agrees with the union's resolution of that issue. Specifically, employer in this case made a major misrepresentation of fact at the bargaining table, on which the union relied and ratified the proposal by one vote. Even though the proposal was never reduced to formal state and signed by the parties and a formal complaint was issued by the NLRB based upon that misrepresentation, the employer refused the continuous offer of the union to reinstate the status quo of the last actual peaceable uncontested status -- the extension agreement of August 26, 1991 -- until the dispute could be resolved. Employer unilaterally (there was no contractual agreement) implemented a change in the method of computing claimants' compensation, which adversely impacted on claimants' situation, and the work stoppage occurred.

The Board reverses the Referee's decision inasmuch as he erred by ignoring evidence, which the Board finds competent and credible, that the proposal of March 26, 1994, was never properly and legally ratified, was never reduced to formal writing, and was never signed by the parties. The proposal was ratified by one vote and was based upon erroneous information and false representations made by the employer at the bargaining table, which gave rise to the NLRB issuing a formal complaint for bad faith bargaining.

The Appellate Courts of Pennsylvania have defined "status quo" as the last actual peaceable uncontested status that preceded the work stoppage. *See Miceli v. Unemployment compensation Board of Review*, 519 Pa. 515, 549 A.2d 113 (1988); *Murdoca v. Unemployment Compensation Board of Review*, 122 Pa. Commonwealth Ct. 303, 551 A.2d 1157 (1988). The status quo in the instant case was that as established by the extension agreement of August 26, 1991. The Board agrees with the claimants that when the employer in this case changed the method of compensating of its employees, stating its authority to be a ratified collective bargaining proposal which had not been reduced to writing and signed, and which had been procured based on the employer's misrepresentations and bad faith bargaining, it was a change in the status quo. As the Commonwealth Court noted in *Murdoca*: "That [the employer's] unilateral retroactive reduction in wages constituted so egregious a break of the agreement that [the employer] must bear the responsibility for the work stoppage. Here [the employer]

not only materially changed the terms of employment in violation of the agreement, but additionally refused to reinstate the status quo until the dispute could be resolved." This is precisely the condition which existed here. Keystone Coca-Cola materially changed the claimants' working conditions and refused to reinstate the status quo until the dispute over the fraudulent proposal could be resolved. On the other hand, our review of the record reveals that, for the period at issue, the union was willing to work and offered to work under the status quo. Where, as here, the work stoppage has taken the form of a strike, the union has the burden of showing that it made the initial peace offering by offering to continue to work under the terms and conditions of the old agreement and that employer rejected that offer. *Philco*. Here, the union has sustained its burden of proof, and benefits are allowed.

CONCLUSION OF LAW: The claimants are not ineligible for benefits under the provisions of Section 402(d) of the Pennsylvania Unemployment Compensation Law.

ORDER: The decision of the Referee is reversed and benefits are granted.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

Thomas L. Simon, Chairman
Francia P. Bonner, Member

NOTICE: You have the right to file an appeal to the Commonwealth Court within 30 days after the mailing date of this Decision and Order. For more information, please read the enclosed blue card.